

I2NAINTCps

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 IN RE:

4 INTEREST RATE SWAPS  
5 ANTITRUST LITIGATION

16-MD-2704 (PAE)

6  
7 New York, N.Y.  
8 February 23, 2018  
9 9:05 a.m.

10 Before:

11 HON. PAUL A. ENGELMAYER

12 District Judge

13 APPEARANCES  
14 (via telephone)

15 QUINN EMANUEL URQUHART & SULLIVAN  
16 Attorneys for Plaintiff Chicago Teachers

17 BY: WILLIAM SEARS, ESQ.

18 -and-

19 COHEN MILSTEIN SELLERS & TOLL P.L.L.C.  
20 Attorneys for Plaintiff Chicago Teachers

21 BY: MICHAEL B. EISENKRAFT, ESQ.

22 WOLLMUTH MAHER & DEUTSCH LLP  
23 Attorneys for Plaintiff Tera

24 BY: JAMES J. BRENNAN, ESQ.

25 SHEARMAN & STERLING LLP  
Attorneys for Defendant Bank of America

BY: RICHARD F. SCHWED, ESQ.

COVINGTON & BURLING LLP  
Attorneys for Defendant J.P. Morgan

BY: ROBERT D. WICK, ESQ.

CAHILL GORDON & REINDEL LLP  
Attorneys for Defendant Credit Suisse

BY: JASON M. HALL, ESQ.

I2NAINTCps

(In chambers)

THE COURT: Good morning. This is Judge Engelmayer. I'm here with my law clerk and with a court reporter. Good morning, everyone. Let me begin just by taking the roll of the participants in the call, beginning with plaintiffs. Do I have Mr. Sears?

MR. SEARS: Yes, your Honor. Good morning.

THE COURT: Good morning. Do I have Mr. Eisenkraft?

MR. EISENKRAFT: You do, your Honor. Good morning.

THE COURT: Good morning. And Mr. Brennan.

MR. BRENNAN: Yes, your Honor. Good morning.

THE COURT: Good morning.

And for the defense, do I have Mr. Schwed?

MR. SCHWED: Yes, your Honor. Good morning.

THE COURT: Good morning. Mr. Wick?

MR. WICK: Yes, your Honor.

THE COURT: And Mr. Hall.

MR. HALL: Yes. Good morning, your Honor.

THE COURT: Good morning.

I will assume, Mr. Sears, that you will be speaking for plaintiffs unless otherwise indicated? Correct?

MR. SEARS: Yes, your Honor.

THE COURT: And Mr. Schwed, you for the defense?

MR. SCHWED: Yes, your Honor.

THE COURT: All right. Very good.

I2NAINTCps

1 First of all, again, thank you for the helpful letter  
2 of February 21st. I think there is a little more business to  
3 take up on this call than there was last month. And so I  
4 propose to get right to it and essentially go down the list of  
5 topics in the letter. As always, I will direct counsel not to  
6 interrupt or speak over one another, just because it's  
7 impossible for the court reporter and me to understand who it  
8 is that's speaking.

9 All right. To begin with, there is a reference at the  
10 top to discovery generally. And the letter states that, apart  
11 from search terms, they are discrete issues as to certain  
12 defendants that may eventually be raised with the Court but  
13 that they are not holding up discovery. Briefly, Mr. Sears,  
14 could you put a little more flesh on that bone.

15 MR. SEARS: Yes, your Honor. There are a couple of  
16 different issues. One concerns certain discrete requests for  
17 production on certain relatively narrow subject matters that  
18 aren't holding up discovery overall. The second concerns  
19 certain non-e-mail custodial sources of documents and  
20 information, such as certain chats and other sources of  
21 information. It is really a cleanup request to make sure that  
22 we're getting all the information that we need. We've sent out  
23 correspondence to defendants about these issues recently and  
24 are hoping to determine if we have any disputes and raise them  
25 with the Court on these issues shortly.

I2NAINTCps

1 THE COURT: All right. I take it at this point,  
2 though, Mr. Sears, there's nothing that is looming as an issue  
3 that likely requires judicial intervention?

4 MR. SEARS: That's correct, your Honor.

5 THE COURT: All right. Look, this is going to be a  
6 refrain in this call, but please move with dispatch to sort out  
7 those issues and try to come to a resolution on them. I don't  
8 want those issues continuing to hold us up. We have a schedule  
9 here and I intend to stick to it or close to it.

10 All right. The next sentence reads, "Defendants  
11 requested some additional information regarding Chicago  
12 Teachers' trades, which it provided." What was the nature of  
13 the newly provided Chicago Teachers information?

14 MR. SEARS: Your Honor, respectfully, I defer to  
15 Mr. Eisenkraft on this issue.

16 THE COURT: Mr. Eisenkraft.

17 MR. EISENKRAFT: Good morning, your Honor. The  
18 information provided on behalf of Chicago Teachers was from an  
19 account with a certain number, and they asked for information  
20 connecting that account number to Chicago Teachers, which we  
21 provided.

22 THE COURT: All right. That's the sum and substance  
23 of it, Mr. Eisenkraft?

24 MR. EISENKRAFT: Yes, your Honor.

25 THE COURT: All right. And at this point,

I2NAINTCps

1 Mr. Eisenkraft, are there any outstanding requests, informal or  
2 formal, between the parties, or more specifically, by the  
3 defense put to the plaintiffs as to Chicago Teachers discovery?

4 MR. EISENKRAFT: No, your Honor. They provided  
5 everything we asked for.

6 THE COURT: All right. Going back to you, Mr. Sears,  
7 as it relates to third-party discovery, I am heartened to see  
8 that in many cases the parties are far along on that front.  
9 However, there is a notation at the end that indicates that a  
10 few third-party disputes may require judicial resolution.

11 Mr. Sears, can you amplify?

12 MR. SEARS: Yes, your Honor. It's really just one or  
13 two third parties at this point. It's nothing imminent. We  
14 just wanted to flag it for the Court in case we do need to  
15 raise it before the next conference, because, as you said, we  
16 are trying to move with dispatch on these issues, and the  
17 nature of the disputes with third parties, they are really  
18 run-of-the-mill discovery disputes. They have to do with  
19 search terms, custodians, and the like. And if we can't reach  
20 agreement shortly, we'll try to bring it to the Court's  
21 attention as soon as possible.

22 THE COURT: OK. Well, do convey to the third parties,  
23 since they're not on the call, my very strong preference for  
24 people to resolve disputes themselves. And I appreciate your  
25 giving me a heads up of a looming issue, although it sounds

I2NAINTCps

1 like it may well never hit my desk.

2 All right. Before I move from that pair of  
3 paragraphs, let me just ask Mr. Schwed, anything that the  
4 defense wants to add by way of factual context or elaboration  
5 as to the two paragraphs under the title, quote/unquote,  
6 discovery generally?

7 MR. SCHWED: No, your Honor.

8 THE COURT: OK.

9 Turning, then, to the next header, called  
10 "Custodians," it sounds as if there may be some discrete  
11 party-specific issues. Mr. Sears, is that something that the  
12 parties are likely to be able to sort out soon?

13 MR. SEARS: Yes, your Honor. It looks as though we'll  
14 be able to sort these out, with the caveat that, as we've noted  
15 in the letter, and I think the last one is possible, that there  
16 might be discrete issues that have to do with the  
17 identification of certain board members as required by the  
18 Court's January 8th order. But we'll endeavor to work these  
19 out with the parties and as quickly as possible if they arise.

20 THE COURT: All right. Look, I tried in that order to  
21 be as clear as I could, and hopefully it's reasonably  
22 self-executing. So hopefully that doesn't generate an issue  
23 for me. But if need be, get it to me soon.

24 All right. Defense, anything on custodians?

25 MR. SCHWED: No, your Honor.

I2NAINTCps

1           THE COURT: OK. I should go back on discovery  
2 generally. I noted that there's a last sentence in the first  
3 paragraph that reads, "The parties have not discussed an  
4 extension of the substantial completion deadline since the last  
5 teleconference." I just want to comment on that. I'm glad to  
6 hear that. I mean, as I indicated at the January 26th  
7 conference, at that call, I'm hopeful that even if there is a  
8 need for modest slippage or a modest extension of that  
9 deadline, it doesn't have a ripple effect down the line in  
10 terms of the schedule. I'm glad to hear that an extension of  
11 that deadline is, at least right now, not being sought or  
12 considered by the parties.

13           All right. Let me get to search terms. And this is a  
14 significant issue, even problem. Looking here at the paragraph  
15 that carries over from page 1 to 2, the thrust of the paragraph  
16 is that after my comments at the last conference, you were able  
17 to move the ball along more, I gather, by sharing more  
18 information, statistically and the like, with respect to  
19 burden. And I'm glad about that. However, I said something  
20 else at that conference. I'm sure you're all aware of it. If  
21 you look at page 15, I'm quoting what I said, "It certainly  
22 seems to me reasonable to expect that the search-term issues  
23 will be resolved by then." "Then" means today, February 23rd.  
24 "I really," continuing with the quote, "I really hope that we  
25 don't have a situation where, four weeks from today," meaning

I2NAINTCps

1 today, "or so, that issue is unresolved even by me."

2 Continuing on with the statement from the last conference, "So,  
3 as counsel are sharing information relevant to burden, please  
4 reverse-engineer the deadlines in your discussions with an eye  
5 towards an expectation that I would like to have ruled on any  
6 dispute in this area by the time of our next call," meaning  
7 today, February 23rd. It seems to me that, directionally,  
8 that's a reasonable target to give you.

9           You can imagine how I reacted at the last sentence of  
10 your joint letter, which reads, "The parties intend to continue  
11 this iterative process and hope that search terms can be  
12 resolved without the Court's assistance before the next  
13 conference." I'm going to be very blunt and direct with you.  
14 The answer is no. You now have one week, until next Friday, to  
15 sort out your search-term issues, because -- and I'm sorry to  
16 be forceful like this about that, but I don't know that I did  
17 anything that could have possibly invited the notion that you  
18 could roll this forward another month with some hope that  
19 iterations would solve the problem. You need to fish or cut  
20 bait by next Friday. And if you haven't been able to do so,  
21 I'll give you a few days to submit a joint letter that sets out  
22 your search-terms disputes, and I will resolve them very  
23 quickly. And I'll hear briefly from counsel if there's some  
24 context I'm missing here, but the letter, as written, utterly  
25 ignored the rather clear guidance I gave you. Mr. Sears, am I



I2NAINTCps

1 missing something?

2 MR. SEARS: Your Honor, you're not missing anything.  
3 We understand you loud and clear and we welcome this deadline.

4 THE COURT: Mr. Schwed?

5 MR. SCHWED: Your Honor, while we understand you, I  
6 would just invite Mr. Hall, who is more familiar with these  
7 issues, if he wants to add anything.

8 THE COURT: Mr. Hall?

9 MR. HALL: No, your Honor. I think there's really  
10 nothing to add. We understand you and we hear you, and we will  
11 satisfy the order.

12 THE COURT: Yes. Look, I mean, if there's something  
13 that I've missed, if there's some technological problem that  
14 has just delayed the ability to produce the data necessary to  
15 quantify burden, I'm not unreasonable, but that's not what  
16 anybody said in the letter. It just sounded like you were  
17 collectively granting an extension, and I'm unhappy with that,  
18 because, I think with that sort of extension, we have a  
19 meaningful risk that the substantial completion deadline would  
20 slip. And having solicited, I think, the understanding from  
21 counsel that we could make this work by today, I'm not inclined  
22 to hold it open much longer.

23 So, for avoidance of doubt, I expect you to solve  
24 these problems by next Friday, and candidly I expect you to  
25 solve these problems. That is to say, I do not expect to have

I2NAINTCps

1 to referee these issues. But if I do, I'd like a joint letter  
2 by the Tuesday afterwards, which is to say the 27th of  
3 February, that sets out, issue by issue, your respective  
4 positions on the search terms, and I will resolve that  
5 extremely promptly. But it's my strong hope that you are able  
6 to resolve all these issues. OK?

7 Before I move off this, Mr. Sears, is there any other  
8 clarity I can possibly give? Is there anything I'm missing  
9 here? Is there any reason why what I've just said is unfair?

10 By the way, my law clerk tells me that I've garbled  
11 the calendar and that a week from Tuesday is in fact March 6th,  
12 not February 27th. I looked at the wrong date. So with that  
13 corrective, you know, this is the chance to speak now or  
14 forever hold your peace on this issue.

15 Mr. Sears.

16 MR. SEARS: Your Honor, nothing you've said is unfair,  
17 and I think you understand the situation correctly. We would  
18 just add that, despite the Court's guidance at the last  
19 conference, there are still a couple defendants that we have  
20 not received hit-count data from. We do not expect that to  
21 hold up progress. We will meet this deadline. But we do need  
22 the data from defendants in order to continue the process and  
23 drive this to conclusion.

24 THE COURT: Which defendant, Mr. Sears?

25 MR. SEARS: Your Honor, if I am recalling this

I2NAINTCps

1 correctly, it would be Deutsche Bank and Morgan Stanley.

2 THE COURT: All right. I do not see counsel for  
3 Morgan Stanley on this call. Mr. Wick, you represent Deutsche  
4 Bank. Just yes or no, is it correct that Deutsche Bank hasn't  
5 gotten the burden data to plaintiffs?

6 MR. WICK: Your Honor, I represent J.P. Morgan, not  
7 Deutsche Bank. And if I could just say a quick word, the  
8 defendants have been breaking their necks to give the hit-count  
9 data to the plaintiffs that they asked for. You made your  
10 comments on a Friday. By Monday my clients had hit-count data  
11 to the plaintiffs. The trouble is that their list of search  
12 terms runs to 35 or 40 pages long. It contains over 400 terms  
13 that they are asking us to search. They want multiple  
14 different cuts of the data and multiple presentations in the  
15 answer. Many of their search terms are constructed in ways  
16 that our systems can't run. And so we literally have been  
17 knocking ourselves out to get them hit counts. I can't speak  
18 for Deutsche Bank or Morgan Stanley. But for J.P. Morgan we  
19 have been knocking ourselves out and getting them prompt  
20 information. And the trouble is, they are taking baby interim  
21 steps and not making fundamental change in their search-term  
22 list. Their prior proposal hit on 18 million documents for  
23 J.P. Morgan. A month later, their latest search-terms proposal  
24 still hit some 14 million J.P. Morgan documents, we estimate  
25 about 80 percent of everything. And so to our mind, the

I2NAINTCps

1 problem here is that the plaintiffs are moving at glacial speed  
2 instead of making more fundamental structural overhauls of  
3 their search term proposals. We made our own search-term  
4 proposal to them, which hits on rounding to about a million  
5 J.P. Morgan documents, and we haven't heard a response to that.

6  
7 THE COURT: All right. First of all, I apologize for  
8 getting your client representation wrong. I'm relying on a  
9 cheat sheet that had been prepared that had that wrong, and I  
10 apologize for that.

11 Mr. Wick, I guess the question that what you've said  
12 presents is, assuming as of next week you are far apart, where  
13 the data that has been requested by the plaintiffs yields very,  
14 very high search-term numbers that would not seem intuitively  
15 realistic, hypothetically, and your proposal is substantially  
16 south of that, I guess the question will be whether there is an  
17 issue that's crystallized for my resolution, given the  
18 possibility that there are middle grounds. Mr. Wick, do you  
19 want to speak to that?

20 MR. WICK: Your Honor, we don't think it's an issue.  
21 It's splitting the baby between a million in the case of my  
22 client and 14 million. We think our proposal is, you know,  
23 it's basically pretty reasonable. And we're happy for them to  
24 make substitutions if they want different sets of search terms.  
25 But our view is, if they can't prove their case with a million

I2NAINTCps

1 J.P. Morgan documents, we don't see why they can prove their  
2 case with 5 million documents.

3 THE COURT: Mr. Wick, I get the point that, just  
4 because there are different positions, my job isn't to average  
5 them. I completely understand that. The issue is whether  
6 there are intermediate data points that could be considered, or  
7 whether the nature of the byplay between counsel is leaving me  
8 only with polar positions, without information about other menu  
9 options. I guess the question is, Mr. Wick, for me, when I'm  
10 resolving a dispute like this, I'm completely unafraid of  
11 choosing a polar position if that's the right one, but I would  
12 at least like to know whether there are coherent options in the  
13 middle. Will I be presented with them?

14 MR. SCHWED: The options -- I didn't mean to interrupt  
15 you, your Honor. Were you finished?

16 THE COURT: I am.

17 MR. WICK: The middle ground, your Honor, may mean  
18 things like, well, running different sets of search terms on  
19 different custodians. And when you're running 35 pages of  
20 search terms with 400 search strings and then you're trying to  
21 customize it across different custodians and then dedup the  
22 responses as plaintiffs have requested us to do, it's going to  
23 take a little time.

24 So we hear you loud and clear. If you want this done  
25 a week from today, it's going to be done a little bit with a

I2NAINTCps

1 blunt instrument. To explore the potential middle grounds, I  
2 don't know that we're going to be able to get it done by a week  
3 from today.

4 THE COURT: All right. Look, Mr. Wick, I think you've  
5 given me enough to say to you that I'm going to lighten up a  
6 little bit the dates I've just given, not a lot but a little  
7 bit, just because I do want productive discussions to ensue.  
8 Plaintiffs, I will just offer the thought, without knowing  
9 anything more, that the outer-bound number that Mr. Wick quoted  
10 of 14 million hits, for one defendant, is jaw dropping. And I  
11 say that so that you can factor it into your reflections on a  
12 next bid-and-ask.

13 Let me change the dates here to at least afford a  
14 little more opportunity. I will give you all till Wednesday,  
15 March 7th, to resolve your search-term issues, which hopefully  
16 will allow one more round of a little more reasoned discussion  
17 than perhaps the deadline I set would have given, and then a  
18 joint letter by Friday, March 9th, setting out, in atomized  
19 form, the discrete issues as to which you've been unable to  
20 reach agreement. It's my strong hope you will resolve this,  
21 because I had budgeted, in terms of my time, that if I was  
22 going to be resolving any of these issues, I was going to be  
23 doing so by today, not in March. But it is what it is. I hope  
24 you will be able to resolve these yourselves. But the  
25 deadline, and I'll put this in an order, will be March 7th for

I2NAINTCps

1 resolving the issues and March 9th, if you can't, for a letter  
2 along the lines of the one you gave me in December that sets  
3 out unresolved discovery disputes.

4 Mr. Wick, does that help?

5 MR. WICK: Yes. Thank you, your Honor.

6 THE COURT: All right. Before we leave search terms,  
7 Mr. Sears, anything further?

8 MR. SEARS: Yes, your Honor. If I can just respond  
9 briefly, we think some of that characterization was unfair and  
10 somewhat inaccurate. You know, the numbers he quotes may be  
11 correct, but we have always maintained that we will reduce the  
12 search terms and take the burden concerns by defendant  
13 seriously. We just need adequate data to do it. In many  
14 cases, it has taken us a long time to get data and when it  
15 comes it is not what we requested. We have had to follow up  
16 repeatedly with individual defendants. So we too are knocking  
17 ourselves out to try to reach a solution here. We are not  
18 wedded to our current proposal and in fact had a  
19 meet-and-confer on Wednesday in which we told defendants we  
20 would consider further cuts based on their proposal, which we  
21 received Tuesday night.

22 So we're working on this as well. We understand the  
23 Court's guidance. We just, we continue to need data from all  
24 defendants and we need the type of granular unique-hit-count  
25 data that we have repeatedly asked for.

I2NAINTCps

1 THE COURT: All right. I don't think I can take this  
2 conversation any further, but saying this as clearly as I can  
3 that I would prefer that you work this out yourselves, but I've  
4 given you a deadline to do that in.

5 All right. Finally, Mr. Schwed, just coming back to  
6 you for other defendants or for defendants generally, anything  
7 further on this set of issues, search terms?

8 MR. SCHWED: No, your Honor.

9 THE COURT: All right. The next topic here is data  
10 discovery. Mr. Sears, can you elaborate a little more on the  
11 data issues that were the subject of the meet-and-confer on  
12 February 5?

13 MR. SEARS: Certainly, your Honor. This has to do  
14 with plaintiff's data request to defendants and determining  
15 what type of data they'll produce and sort of a temporal scope  
16 for data. We had a productive meet-and-confer on February 5th.  
17 We followed up with an e-mail and informal discussion, and  
18 we're hoping to have another meet-and-confer next week.

19 THE COURT: Do you expect that this will result in an  
20 agreed resolution?

21 MR. SEARS: We certainly hope so, your Honor.

22 THE COURT: Mr. Schwed?

23 MR. SCHWED: We're hopeful as well, your Honor.

24 THE COURT: At least at this point I'm not hearing any  
25 likelihood of a dispute requiring my resolution.



I2NAINTCps

1 All right. The next topic is entitled "Amended  
2 Complaint." And I have a handful of questions about that, but  
3 let me just begin without explanation but, defense, Mr. Schwed,  
4 what will the defendant's position be, bottom line, if you know  
5 yet, as to the proposed third amended complaint?

6 MR. SCHWED: Yes, your Honor. With the caveat that  
7 we've had roughly one day to review what's been filed, we do  
8 not expect to oppose the addition of the new plaintiff, LACERA,  
9 but we do, however, expect to oppose the rest of the amended  
10 complaint, in particular the attempt to revise the dismissed  
11 claims, the claims that were dismissed in the motion to  
12 dismiss.

13 THE COURT: Will you be objecting to the added  
14 allegations that fall within the scope of the sustained claims?

15 MR. SCHWED: I don't think we've parsed the amended  
16 complaint to that level of granularity as to whether there are  
17 certain allegations that support sustained claims that we  
18 wouldn't object to. We, I would say, our review has been  
19 focused on the broader question of the dismissed claims that  
20 they are attempting to get undismissed. And that is certainly  
21 something we will object to and oppose.

22 THE COURT: Is it your expectation, Mr. Schwed, that  
23 there will be a singular defense brief in response or multiple  
24 ones?

25 MR. SCHWED: We expect to be able to do it in a single

I2NAINTCps

1 brief.

2 THE COURT: All right. How much time were you seeking  
3 for your brief in opposition?

4 MR. SCHWED: We were thinking 40 days, your Honor,  
5 given the length of what they submitted. They've basically  
6 added 50 pages to an already long complaint. And as I'm sure  
7 your Honor can appreciate, it actually takes a lot longer to  
8 file a single brief that involves this number of defendants and  
9 in-house lawyers than it might otherwise appear to take. So  
10 that's what we would request.

11 THE COURT: What would that bring us to? What date?

12 MR. SCHWED: Roughly April 4th, thereabouts. I  
13 haven't calculated exactly.

14 THE COURT: All right. I'm going to reserve on that  
15 and come back to that a little later in the conversation. It's  
16 a longer period of time than I had expected, but I certainly  
17 appreciate that it takes time to herd cattle and you've got a  
18 lot of issues here.

19 Let me just say this. I'm not going to invite, or  
20 authorize, a reply. This needs to get resolved. I will be  
21 happy to receive an opposition brief, but, plaintiffs, this is  
22 not a matter as to which I am permitting a reply brief.

23 All right. Plaintiffs, I have some questions for you  
24 about this topic, and I'll address myself to Mr. Sears. Are  
25 you the right person?

I2NAINTCps

1 MR. SEARS: Yes, your Honor.

2 THE COURT: Am I correct that February 21st was the  
3 first time on which this Court was put on notice of your intent  
4 to file a substantive amendment to the complaint that would  
5 have the effect of reviving dismissed claims?

6 MR. SEARS: That's correct, your Honor.

7 THE COURT: All right. When did you first put the  
8 defense on notice of that?

9 MR. SEARS: I believe it was a week or two before  
10 that.

11 THE COURT: Mr. Schwed, when was the defense first  
12 notified of a substantive amendment that, if granted, would  
13 have the potential to revive dismissed claims? When were you  
14 first put on notice of that?

15 MR. SCHWED: I don't recall the exact day, but it was  
16 approximately, I believe, one day last week.

17 THE COURT: It was last week, meaning the week of  
18 February 12th through 16th?

19 MR. SCHWED: Actually, I'm being told, we think it's  
20 maybe February 19th.

21 THE COURT: February 19th. So two days before the  
22 letter to me.

23 MR. SCHWED: I'm sorry. A week before the letter,  
24 February 14th.

25 THE COURT: All right. So your Valentine's Day gift

I2NAINTCps

1 from the plaintiffs was notice of this substantive amended  
2 third complaint. Is that what you're saying, Mr. Schwed?

3 MR. SCHWED: Yes. Roughly speaking, yes.

4 THE COURT: And Mr. Sears, is that directionally about  
5 right? Is that when the defense was first told that a  
6 superseder of this nature was coming?

7 MR. SEARS: Your Honor, that sounds right to me.

8 THE COURT: Mr. Sears, when did the plaintiffs first  
9 consider a third amended complaint that would have the effect  
10 of reviving dismissed claims?

11 MR. SEARS: Your Honor, it was certainly earlier than  
12 that, but the decision to do so was not made until more  
13 recently. As we set forth in our motion, this has been based  
14 on an extensive, ongoing investigation that continued up  
15 through the filing of the amended complaint.

16 THE COURT: When did the plaintiffs first consider  
17 filing an amended complaint that would revive dismissed claims,  
18 was my question.

19 MR. SEARS: Your Honor, one second.

20 Your Honor, we have considered filing an amended  
21 complaint from the time we received the Court's ruling on  
22 defendant's motion to dismiss.

23 THE COURT: Is there a reason that you did not notify  
24 the defense till about February 14th of the possibility that an  
25 amended complaint of this nature might be filed? Obviously,

I2NAINTCps

1 Mr. Sears, we've been doing a lot of work together with respect  
2 to discovery. I can talk about that in a moment. I am eager  
3 to understand the thought process, because surely there was  
4 one, of not sharing with your adversaries that this significant  
5 development in the case might happen. Why did the plaintiffs  
6 not alert the defense to the possibility of such an amended  
7 complaint until February 14th? Please answer the question.

8 MR. SEARS: Yes, your Honor. We wanted to make sure  
9 the amended complaint was in a near final form so that we could  
10 tell them with certainty what the new allegations would be.

11 THE COURT: And, Mr. Sears, did you, in deciding not  
12 to tell, in making apparently an affirmative decision not to  
13 tell the defendants until February 14th of the superseder, what  
14 thought did you give to the interplay between the potential  
15 amended complaint and the long ongoing discovery discussions?  
16 What was your thinking in not alerting the defendants to this?

17 MR. SEARS: Your Honor, with respect, Mr. Brockett is  
18 here and would like to address the issue. I know he's not  
19 listed as a participant, but he would like to answer this  
20 question.

21 THE COURT: The answer is no. Mr. Sears, I've asked  
22 you a question. The letter said that you would be prepared to  
23 address it. Answer my question.

24 MR. SEARS: Your Honor, we did not view it as an  
25 affirmative decision to withhold information. We wanted to

I2NAINTCps

1 make sure this complaint was in a near final form and that we  
2 were set on filing it before we informed defendants.

3 THE COURT: Is it your view that if the third amended  
4 complaint were permitted, it would have any effect on the scope  
5 of discovery as has been negotiated and ruled upon so far?

6 MR. SEARS: Your Honor, candidly, yes, it would have  
7 an effect on the scope of discovery. And I would just add that  
8 we were still interviewing witnesses and gathering information  
9 up through the time when we notified defendants, and that  
10 informed our decision as well.

11 THE COURT: And did it occur to you that the  
12 substantial investment of time that, among others, the defense  
13 and Court were making in resolving and discussing discovery  
14 issues, might be potentially mooted by the filing of a third  
15 amended complaint of this nature, Mr. Sears?

16 MR. SEARS: Yes, your Honor, it did. And we're  
17 sensitive to those concerns, and we apologize for any  
18 inconvenience to the Court and to defense counsel. Certain  
19 critical witnesses only came to light recently and were still  
20 being talked to up through the time period that we notified  
21 defendants, and we wanted to make sure we had the best  
22 available information when we did so.

23 THE COURT: Please name those witnesses now.

24 MR. SEARS: Your Honor, with all due respect, these  
25 are confidential witnesses, and we do not feel comfortable

I2NAINTCps

1 disclosing their identities.

2 THE COURT: Please get me a letter by the close of  
3 business today that lists their names. You are permitted to  
4 file it ex parte. But I want the names of the confidential  
5 witnesses whom you are referring to and I want the dates when  
6 you first spoke to them and the dates when you last spoke to  
7 them, because I am --

8 MR. SEARS: Understood, your Honor.

9 THE COURT: All right. That's by 5 o'clock today.

10 All right. Let me ask you, Mr. Sears, continuing on,  
11 this is our fourth or fifth discovery call; did you give  
12 thought in any of the letters that you are submitting to the  
13 Court to alert the Court that this was a possible development  
14 in the case?

15 MR. SEARS: Yes, your Honor, we did, but we wanted to  
16 make sure that it was something we were going to go through  
17 with and that we had the best available information before we  
18 did so. And we again apologize for any inconvenience to the  
19 Court.

20 THE COURT: So when you made the affirmative decision  
21 not to tell the Court that there was a possibility of an  
22 attempt to file a consolidated amended complaint, did it occur  
23 to you that the Court might regard that as a material omission  
24 in my thinking about the case schedule and thinking about the  
25 discovery disputes that I was reviewing, month after month,

I2NAINTCps

1 with all of you and sometimes resolving? As part of your  
2 decision not to tell me that this was a possibility, did you  
3 reflect on that, Mr. Sears?

4 MR. SEARS: Your Honor, we did not make a final  
5 decision to file an amended complaint until recently. We did  
6 not make an affirmative decision to withhold anything from the  
7 Court or omit any material information.

8 THE COURT: Well, OK. Look, we're talking here about  
9 basic human courtesy. And it seems to me that if you were  
10 thinking about this as a real possibility, it is audacious not  
11 to share with your adversaries or the Court the possibility of  
12 what at least has the prospect of being a fundamental game  
13 changer in the case. I will just say for all of you that when  
14 I read that in the letter, I had the same reaction that John  
15 McEnroe had in Wimbledon in 1981, which is, You cannot be  
16 serious. I'll be happy to resolve this on the merits, but as a  
17 matter of decorum, professionalism, notice, diplomacy, saving  
18 this for the last minute was startling and certainly far short  
19 of what I expect of counsel before me.

20 I will note for what it's worth that you together set  
21 up for me in December a substantial number of discovery issues.  
22 I resolved them. Central to those issues was the scope of the  
23 case as defined by the Court's motion-to-dismiss ruling. I  
24 spent a good deal of my December break resolving those issues.  
25 It would have been relevant information to me, Mr. Sears, to



I2NAINTCps

1 know that there is a possibility that this entire venture would  
2 have been overtaken by the work that you were apparently doing  
3 with your witnesses, and at least notice that would have said,  
4 we are considering it, it's a possibility, would have been well  
5 worth it.

6 So to the extent you have further litigation in the  
7 Southern District of New York, plaintiff's counsel, I expect  
8 you will be substantially more candid with the Court and your  
9 adversaries.

10 All right. Defense, let me ask you, for the  
11 submission that you are going to make, I recognize you will be  
12 addressing the viability or not of the theories that are  
13 articulated in the amended complaint. Please address the  
14 following issues as well in your submission: Number one, any  
15 prejudice to the defense. Number two, any effect on the  
16 schedule. And you should address that both in terms of the  
17 assumption that this affects discovery and that it does not.  
18 In other words, one potential outcome, I suppose, would be to  
19 permit the complaint to be amended but, given how much time has  
20 passed, to not disturb discovery. I would like you to address  
21 as well whether or not the disclosure of this is consistent or  
22 not consistent with representations, express or implied, by  
23 plaintiff's counsel to the Court and to the defense since the  
24 resolution of the motion to dismiss. And finally, I expect you  
25 will distinguish in your brief between at least the following

I2NAINTCps

1 three categories of allegations: LACERA, that's number one.  
2 Number two is amplified factual allegations within the scope of  
3 the sustained theories. And number three, what I understand to  
4 be the real battleground here, is new allegations that would  
5 potentially revive dismissed theories of liability. So please  
6 break that out.

7 Let me ask you, Mr. Sears, just a factual question.  
8 It was unclear to me from your third amended complaint whether  
9 you are adding back in HSBC or ICAP. They are still listed as  
10 defendants in your third amended complaint. Are they still  
11 defendants in that complaint?

12 MR. SEARS: No, your Honor. We tried to make that  
13 clear in the motion, and we apologize if it was not.

14 THE COURT: So, despite being listed as defendants,  
15 they're actually not defendants. Is that correct?

16 MR. SEARS: Correct, your Honor.

17 THE COURT: What about Tradeweb?

18 MR. SEARS: Your Honor, Tradeweb is a defendant, and  
19 HSBC and ICAP are simply to preserve our rights and for the  
20 record.

21 THE COURT: All right. But, in other words, you are  
22 proposing to add Tradeweb back into the case.

23 MR. SEARS: Yes, your Honor.

24 THE COURT: And when did you first tell Tradeweb that  
25 it was going to be the subject of an amended complaint, or an

I2NAINTCps

1 attempted amended complaint, that, if granted, would put them  
2 back in the case? When did you first give Mr. Garvey notice of  
3 that?

4 MR. SEARS: Your Honor, we have not given Mr. Garvey  
5 notice of that.

6 THE COURT: I see. So Mr. Garvey, for example, is not  
7 on this call. Correct? So far as you know.

8 MR. SEARS: Not that I'm -- correct, your Honor. Not  
9 as far as I know.

10 THE COURT: You did not tell him, for example, that  
11 his interest might be concerned, his client's interest.

12 MR. SEARS: Your Honor, we told liaison counsel about  
13 the substantive amendment, and if it was not clear that  
14 Tradeweb was being mentioned, you know, we apologize for the  
15 error and we did not specifically tell their counsel.

16 THE COURT: Let me ask you this. Since the motion-  
17 to-dismiss decision, there have been no doubt many hundreds of  
18 hours devoted by counsel to discovery disputes and a not  
19 insubstantial amount of time by me and my staff on them. One  
20 of the key issues is making sure that all the relevant  
21 stakeholders participate in these discussions. When did it  
22 first occur to you that you might seek to reintroduce Tradeweb  
23 as a defendant in the dispute, Mr. Sears? Might.

24 MR. SEARS: Your Honor, we don't know when we made  
25 that decision. It was recently, as with all the final

I2NAINTCps

1 decisions regarding the amended complaint.

2 THE COURT: Did you think affirmatively of alerting  
3 Tradeweb and its counsel that, because Tradeweb might be the  
4 subject of an amended complaint, it was worth their while to  
5 monitor or participate in the discovery discussions?

6 MR. SEARS: Your Honor, we did not ask that of  
7 Tradeweb's counsel. We have been corresponding with liaison  
8 counsel for all defendants regarding the amended complaint.

9 THE COURT: Right. And liaison counsel for all  
10 defendants would reasonably be understood to be all  
11 nondismissed defendants. Do you agree with that, Mr. Sears?

12 MR. SEARS: Yes, your Honor, I would. I would just  
13 note we also have a third-party subpoena out to Tradeweb and  
14 have been engaged in negotiations with them on that front  
15 regarding discovery.

16 THE COURT: And you have labeled that a third-party  
17 subpoena. The nature of what you have submitted to Tradeweb  
18 has not indicated that they were at risk of being moved from a  
19 third party to a party. Correct?

20 MR. SEARS: Correct, your Honor.

21 THE COURT: All right. Look, I will resolve this on  
22 the merits, although obviously part of the consideration here  
23 is not only the substantive viability of the amended complaint  
24 but also considerations of prejudice and effect on our schedule  
25 and the like. But I would just offer this for plaintiff's

I2NAINTCps

1 counsel, once again: I expect a lot better. I have to tell  
2 you that, with counsel of this caliber, the hide-the-ball  
3 quality about this is far, far from what I expect. And going  
4 forward in this case and in any other case in my court, I  
5 expect that if there is a material development like this that  
6 is under consideration, unless it implicates issues of witness  
7 safety or something like that, I expect prompt notice, because  
8 a lot of us have spent a lot of time engaging with a lot of  
9 issues and making a lot of decisions that at least potentially  
10 could be upended and all of our time proven wasted by your  
11 evidently affirmative decision not to notify anybody of the  
12 possibility of an amended complaint until it became a certainty  
13 in your mind. I expect a lot better.

14 With that, let me just say this. For the purpose of  
15 continued discovery discussions, counsel should proceed ahead  
16 with your discussions on discovery, on the following two  
17 premises, which I think are the best ones to organize your  
18 discussions. Number one, it is realistic to expect that I will  
19 approve the addition of LACERA to the case. To the extent that  
20 affects any discovery disputes, that is the safe operating  
21 assumption.

22 For the purposes of your discovery disputes, you  
23 should assume that the guidepost as to the scope of the case  
24 remains the second amended complaint as narrowed by my motion-  
25 to-dismiss ruling. In other words, the default mode for your

I2NAINTCps

1 discovery discussions ought to be that the substantive scope of  
2 the case remains in place. In the event that I permit some or  
3 all of the substantive changes in the third amended complaint  
4 to go forward, we will take up what if any impact that has on  
5 discovery then. But I want to clear away that underbrush and  
6 make sure that your discussions about discovery are not skewed  
7 by considering the expected value of my decision on the third  
8 amended complaint and the possibility that I might sustain  
9 those additional allegations. Whatever I'm destined to do I'm  
10 destined to do and I won't know until I get the defense- side  
11 perspective, but assume that the shape of the case is the  
12 second amended complaint as narrowed by the motion-to-dismiss  
13 ruling but with the addition of LACERA.

14 With that, defense counsel, can you give me a slightly  
15 closer date than April 4th? Can we say five weeks from today?

16 MR. SCHWED: Yes, your Honor.

17 THE COURT: All right. Which I think puts us at March  
18 the 30th? Defense counsel, Mr. Schwed, can you do that?

19 MR. SCHWED: Yes, your Honor.

20 THE COURT: All right. Thank you. I will endeavor to  
21 rule very promptly after receiving that submission. Again, I'm  
22 not inviting or authorizing a reply, but I do want, and I  
23 permit ex parte, the submission today with respect to the  
24 timing of the witness contact. And I expect you to be  
25 comprehensive, plaintiff, with respect to the witnesses whose

I2NAINTCps

1 information informed the filing on February 21st of the  
2 proposed third amended complaint.

3 The final item on my agenda is just to set a date for  
4 the next conference. I expect provisionally that it will  
5 likely be March 19th. I am traveling on the 23rd, which would  
6 be four weeks from today. But I will know for sure soon and  
7 will file an order that gives you that time.

8 Mr. Sears, anything further from the plaintiffs?

9 MR. SEARS: No, your Honor.

10 THE COURT: Mr. Schwed, anything from the defense?

11 MR. SCHWED: No, your Honor, except just one quick  
12 thing, because I like to always be accurate and precise with  
13 the Court. I did have a moment to check my e-mails and confirm  
14 that it was February 14th, the date we learned of this.

15 THE COURT: OK. In other words, you are representing  
16 that before February 14th, you had no indication that a  
17 substantive amendment to the complaint was going to be filed.

18 MR. SCHWED: Correct, but we had had conversations  
19 about the addition of LACERA as a new plaintiff.

20 THE COURT: Right. And that's reflected in the  
21 January 24th letter to the Court by counsel, which reports the  
22 potential amendment to add LACERA, but in what now appears to  
23 be a good example of a dog not barking says nothing about the  
24 other changes that were under consideration.

25 All right. Very good. We stand adjourned. I will  
look forward to speaking with you about three and a half weeks

I2NAINTCps

from now. Thank you, counsel.  
o0o